KTS SDN BHD

v.

STANDARD CHARTERED BANK

COURT OF APPEAL, MALAYSIA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO. A-02-648-97]
15 JANUARY 2004

CONTRACT: *Privity - Agency - Purchase of sawn timber - Appellant signing purchase contracts with sawmill owner but remitted payment to sawmill operator - Whether operator privy to contracts - Whether an agent of owner - Whether contractual relationship existed between appellant and operator - Whether arrangement entered into illegal - Contracts Act 1950 s. 24(b) - Malaysian Timber Industry Board (Incorporation) Act 1973 s. 13*

INSURANCE: *Fire insurance - Joint policy - Respondent taking up joint fire insurance policy to protect insurable interest in sawmill - Interest included properties belonging to appellant - Insurance money paid to respondent by insurer - Whether held in trust for appellant - Whether appellant entitled to claims thereof*

TRUSTS: *Trust property - Insurance policy - Trust property subject of fire insurance policy - Insurance money paid by insurer thereof - Whether held in trust for owner of property - Whether owner entitled to claims thereof*

The appellant had contracted to purchase sawn timber from a sawmill owner, Foong Seng Fuat Sawmill Sdn Bhd ('Foong'), and on Foong's instruction paid the contract price of RM597,152.39 thereof to the sawmill's operator ('Lampak'). However, before Lampak could make any delivery to the appellant, fire broke out at the sawmill destroying the sawn timber in question. Lampak and its banker, the respondent, had earlier taken a joint fire insurance policy in respect of 'materials and stock-in-trade' at the sawmill, and in the event, following the fire, a RM700,000 compensation was paid by the insurance company to Lampak and the respondent. By a consent order this sum was apportioned to the parties in the proportion of RM92,982 to Lampak and RM607,018 to the respondent.

The appellant, in the meanwhile, sued Lampak and Foong for the return of the contract sum paid to Lampak and obtained judgment against Lampak. However, of the amount ordered against Lampak, the appellant recovered only RM57,956.56, leaving a balance of RM539,195.83 ('the balance sum'), before both Lampak and Foong were wound up. In the circumstances, to recover the balance sum, the appellant sued the respondent arguing that the respondent was holding the RM607,018 insurance sum in trust for them. The appellant's action was dismissed by the learned judge holding that: (i) Lampak was not an agent of Foong and therefore not privy to the contracts between the appellant and Foong; (ii) there was no nexus between the appellant and the respondent contractually; (iii) the oral evidence adduced by the appellant presumably to contradict the terms of the written contracts was inadmissible by virtue of s. 92 of the Evidence Act 1950; and (iv) Lampak was operating the sawmill illegally and therefore any contract that it had entered into with the appellant, if at all, was illegal within the meaning of s. 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973 ('the Act') and s. 24(b) of the Contracts Act 1950. Dissatisfied, the appellant appealed.

Held:
Per Abdul Kadir Sulaiman JCA

[1] There was no dispute as to the actual party operating the sawmill owned by Foong, which was Lampak. The evidence suggested that Lampak was doing it all for Foong who entered into contract to supply the timber from its sawmill under the operation of Lampak to the appellant. It was Foong who instructed the arrangement to be such, thereby constituting Lampak as its agent in the transaction. (p 92 d-f)

[1a] Even if Lampak was not an agent of Foong, there was created a contractual relationship directly between the appellant and Lampak, albeit orally. This was evidenced by documents such as the nine cheques issued by the appellant to Lampak being the contract price for the sawn timber amounting to RM597,152.39, the various invoices issued under the letterhead of Lampak in favour of the appellant and the payment vouchers under the letterhead of the appellant made in favour of Lampak. The learned judge in concentrating on the various written contracts entered into between the appellant and Foong, had lost sight of this distinct contractual relationship subsisting between the appellant and Lampak. Hence, to hold that there was no privity of contract between the appellant and Lampak in the circumstances was clearly erroneous. (pp 92 g-h & 93 a)

[2] It was wrong of the learned judge to have excluded the oral evidence. The oral evidence proffered was not in any way put with a view to contradict the written agreements entered into between the appellant and Foong. Its introduction rather was purely for the purpose of establishing the existence of an independent oral contract between Lampak and the appellant over the supply of the sawn timber of which full payment had been made. On this ground alone, it was erroneous to dismiss the claim of the appellant against the respondent. (p 93 e-f)

[3] The respondent might have an insurable interest in respect of some of the properties in the sawmill to cover the amount owed it by Lampak. If such was the case, the respondent should have taken a separate policy covering the interest. This the respondent did not do and chose instead to join with Lampak as co-assured to obtain a fire policy to include also those properties which it very well knew did not belong to it. Hence, of the money the respondent received from the insurer in respect of the fire at the sawmill, must necessarily include that amount which belonged to the appellant in respect of properties held in trust by Lampak for the appellant. The respondent could not say that the RM607,018 which it received as its share by the consent order represented its insurable interest. In the circumstances, the appellant was entitled to recover from the respondent the balance sum of RM539,195.83, the respondent having held the same in trust for the appellant out of the RM607,018 apportioned to it by the consent order. (p 94 d-g)

[4] There was no evidence to support the learned judge's conclusion that the appellant had elected to enter into a contract with Foong instead of Lampak because Lampak was operating the sawmill without a licence. Lampak, in any case, was not at all caught by the provisions of s. 13 of the Act and it was therefore wrong of the learned judge to have held that the arrangement between Lampak and the appellant was illegal. And even if the learned judge was right in his interpretation of the said s. 13, it would not make the appellant suffer the evil of Lampak, as there was no evidence that, in making the arrangement, the appellant was in *pari delicto.* (p 98 a-c)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah mengikat kontrak dengan pemilik kilang papan Foong Seng Huat Sawmill Sdn Bhd ('Foong') bagi membeli sejumlah papan gergaji dan atas arahan Foong telah membayar harga pembelian sebanyak RM597,152.39 kepada pengusaha yang menjalankan operasi kilang papan tersebut ('Lampak'). Bagaimanapun, sebelum Lampak sempat membuat apa-apa penghantaran kepada perayu, satu kebakaran telah berlaku di kilang papan sekaligus memusnahkan papan gergaji berkenaan. Lampak dan responden, pembiaya kewangannya, sebelum itu telah mengambil satu polisi insurans kebakaran bersama bagi melindungi 'materials dan stock-in-trade' di kilang papan, dan kerana itu, ekoran kebakaran yang berlaku, satu pampasan berjumlah RM700,000 telah dibayar oleh syarikat insurans kepada Lampak dan responden. Melalui satu perintah persetujuan jumlah ini telah diagihkan pada kadar RM92,982 kepada Lampak dan RM607,018 kepada responden.

Sementara itu, perayu mendakwa Lampak dan Foong menuntut pembayaran balik harga belian yang dibayar kepada Lampak dan memperoleh penghakiman terhadap Lampak. Namun, dari jumlah yang diperintahkan terhadap Lampak, perayu hanya memperoleh RM57,956.56, meninggalkan baki sebanyak RM539,195.83 ('jumlah baki'), sebelum kedua-dua Lampak dan Foong digulung. Oleh yang demikian, bagi mendapatkan jumlah baki, perayu mendakwa responden sambil menghujah bahawa responden memegang wang insurans sebanyak RM607,018 tersebut sebagai amanah untuknya. Tuntutan perayu telah ditolak oleh yang arif hakim, yang berpendapat bahawa: (i) Lampak bukanlah agen Foong dan kerana itu bukan privi kepada kontrak di antaran perayu dan Foong; (ii) secara kontrak tidak ada nexus langsung di antara perayu dan responden; (iii) keterangan lisan yang dikemukakan oleh perayu yang dianggap bertujuan menyanggah terma-terma perjanjian bertulis tidak boleh diterima masuk mengambil kira s. 92 Akta Keterangan 1950; dan (iv) Lampak mengusahakan kilang papan secara haram dan kerana itu, apa jua perjanjian yang dimasuki olehnya dengan perayu, jika ada, adalah tak sah dalam ertikata s. 13 Akta Lembaga Perindustrian Kayu Malaysia (Perbadanan) 1973 ('Akta') serta s. 24(b) Akta Kontrak 1950. Merasa tidak puas hati, perayu merayu.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR

[1] Tidak ada keraguan tentang siapakah pihak yang sebenarnya menjalankan operasi kilang papan yang dimiliki oleh Foong, iaitulah Lampak. Keterangan menunjukkan bahawa Lampak melakukan kesemuanya untuk Foong yang memeterai perjanjian dengan perayu untuk membekalkan

papan gergaji dari kilang papannya yang diusahakan oleh Lampak kepada perayu. Foong adalah orang yang mengarahkan aturan sedemikian, sekaligus menjadikan Lampak sebagai agennya dalam transaksi tersebut.

[1a] Jika pun Lampak bukan agen Foong, telah wujud suatu hubungan kontraktual secara terus antara perayu dan Lampak. Ini dibuktikan melalui dokumen-dokumen seperti sembilan cek yang dikeluarkan oleh perayu untuk harga papan gergaji berjumlah RM597,152.39, inbois-inbois yang dikeluarkan di bawah kepala surat Lampak kepada perayu dan baucer-baucer pembayaran di bawah kepala surat perayu yang ditujukan kepada Lampak. Yang arif hakim dalam menumpukan perhatian kepada perjanjian-perjanjian bertulis di antara perayu dan Foong, telah gagal melihat perhubungan kontraktual khusus yang wujud di antara perayu dan Lampak. Maka itu adalah silap untuk mengatakan bahawa tidak wujud priviti kontrak di antara perayu dan Lampak dalam keadaan sedemikian.

[2] Adalah silap bagi yang arif hakim untuk mengetepikan keterangan lisan. Keterangan lisan yang dikemukakan bukanlah bertujuan untuk menyanggah perjanjian-perjanjian bertulis yang dimeterai antara perayu dan Foong. Sebaliknya, pengemukaannya adalah semata-mata untuk membuktikan kewujudan satu kontrak lisan yang berasingan di antara perayu dan Lampak mengenai bekalan papan gergaji di mana bayaran sepenuhnya telah pun dibuat. Atas alasan ini sahaja, ianya silap untuk menolak tuntutan perayu terhadap responden.

[3] Responden mungkin mempunyai kepentingan yang boleh diinsuranskan berkaitan sebahagian harta di dalam kilang papan bagi melindungi jumlah yang dihutang oleh Lampak kepadanya. Jika begitu, responden sepatutnya mengambil satu polisi insurans yang berasingan bagi melindungi kepentingan tersebut. Ini tidak dibuat oleh responden yang sebaliknya memilih untuk bersatu dengan Lampak sebagai assured bersesama bagi mendapatkan polisi kebakaran yang merangkumi harta-harta yang ia amat ketahui tidak dimiliki olehnya. Dengan itu, dari jumlah wang yang diterima oleh responden dari syarikat insurans berkaitan kebakaran yang berlaku di kilang papan, semestinyalah merangkumi jumlah yang menjadi milik perayu berpunca dari harta-harta yang dipegang oleh Lampak bagi amanah perayu. Responden tidak boleh berkata bahawa jumlah RM607,018 yang ia terima sebagai bahagiannya melalui perintah persetujuan sebagai mewakili kepentingannya boleh diinsuranskan. Oleh yang demikian, perayu berhak untuk mendapat balik jumlah baki sebanyak RM539,195.83, kerana jumlah itu dipegang oleh responden untuk amanah perayu dari jumlah RM607,018 yang diagihkan kepadanya melalui perintah persetujuan.

[4] Tidak ada keterangan bagi menyokong konklusi yang arif hakim bahawa perayu memilih untuk memeterai perjanjian dengan Foong dan tidak Lampak kerana Lampak menjalankan operasi kilang papan tanpa permit. Walau apa pun, Lampak langsung tidak diliputi oleh peruntukan s. 13 Akta dan yang arif hakim silap apabila merumuskan bahawa transaksi yang diatur di antara perayu dan Lampak adalah tak sah. Dan jikapun yang arif hakim betul dalam interpretasinya terhadap s. 13 itu, perayu tidak harus memikul beban keburukan Lampak, oleh kerana tiada keterangan bahawa, dalam membuat aturan sedemikian, perayu adalah in pari delicto.

Rayuan dibenarkan.]

Case(s) referred to:

KTS Sdn. Bhd. v. Foong Seng Fuat Sawmill Sdn. Bhd. & Anor. [1987] 1 CLJ 596 ***(refd)***

Hepburn v. Tomlinson (Hauliers) Ltd. [1966] AC 451 ***(refd)***

Maurice v. Goldsbrough Mort & Co. Ltd. [1939] 3 All ER 63 ***(refd)***

Asia Television Ltd & Anor v. Viwa Video Sdn Bhd & Connected Cases [1984] 2 MLJ 304 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(b)

Evidence Act 1950, s. 92

Malaysian Timber Industry Board (Incorporation) Act 1973, s. 13

For the appellant - Ahmad Moosdeen (En Paramjothy); M/s Chan, Moosdeen & Partners

For the respondent - Leong Kok Keong; M/s Kean Chye & Sivalingam

Reported by WA Sharif

JUDGMENT

Abdul Kadir Sulaiman JCA:

Foong Seng Fuat Sawmill Sdn. Bhd. (hereinafter referred to as "Foong") at all material time was the owner of a sawmill. However, the running of the daily business of the sawmill was in the hand of Lampak (M) Timber Sdn. Bhd. (hereinafter referred to as "Lampak"). The capital to run the business by Lampak came in parts from the respondent bank. According to the evidence, a loan of RM600,000 was given out by the respondent to Lampak. A debenture was executed on the assets of Lampak situated at the sawmill.

To protect their interests over the properties in the sawmill, Lampak jointly with the respondent took out a fire policy against loss caused by fire or lightning over the properties in the sawmill belonging to "the insured or held in trust or on commission or on joint account with others and for which the insured is responsible". The said properties were particularized in the policy as "All Materials and Stock-in-Trade consisting mainly of sawn timber and logs in connection with the Insured's Trade contained within the premises compound".

On 14 June 1985 fire broke out at the sawmill. All timbers and logs therein were destroyed. Pursuant to a consent judgment in High Court Civil Suit No. 2300 of 1985 in the action by the joint assured against the insurance company, they were paid a total sum of RM700,000. The amount was apportioned in the proportion of RM607,018 to the respondent and RM92,982 to Lampak.

In the course of the sawmill business, the owner, Foong, entered into various written agreements with the appellant for the supply of sawn timber, the total value of which amounted to RM597,152.39. Pursuant to the said agreements with the owner, the appellant fully paid the amount to Lampak on the instruction of Foong. However, the sawn timber was never delivered to the appellants on the delivery dates agreed or at all.

For having paid the amount due but not receiving the sawn timber, the appellant in High Court Civil Suit No. 1543 of 1985 filed a claim against Foong and Lampak for the return of the above sum paid. Lampak, however, did not enter appearance to the writ issued and by a court order of 13 January 1986, it was ordered to pay the appellant the said amount claimed with interest.

Of the amount ordered against Lampak, the appellant recovered only RM57,956.56 from it, leaving a balance of RM539,195.83 before Lampak was wound up. The appellant did not pursue further against Lampak. But the appellant saw in the hand of the respondent arising out of the consent judgment in Suit No. 2300 of 1985 mentioned earlier, a sum of RM607,018.49 being a portion of the full amount paid out by the insurance company in respect of the fire incident at the sawmill.

So, by this action before the High Court, the appellant on 26th March 1987 caused a writ to be issued against the respondent for:

(a) a declaration that the respondent holds the amount it paid to Lampak in respect of the supply of sawn timber, from a total sum the respondent received from the insurance company, in trust for the appellant,

(b) that the respondent do pay the said amount to it forthwith with interests.

This action by the appellant against the respondent was dismissed by the learned judge with costs. Hence, this appeal before us. On 25 January 2003, we heard the arguments and at the end of it we handed down our oral decision allowing the appellant's appeal. We now provide our reasons for so deciding.

This appeal, therefore, revolves around the fight between the appellant and the respondent over part of the money paid out by the insurance company to the respondent as mentioned earlier.

The learned judge was satisfied that the sum of money arising out of the various contracts entered into between the appellant and Foong was paid to Lampak by the appellant. But he is of the view that the various contracts for the supply of the sawn timber were made between the appellant and Foong. As such Lampak was not a party to those contracts as there was no provisions in the various contracts regarding the creation of an agency between the relevant parties. The appellant's contention that Lampak was acting as an agent for Foong was not supported by any evidence. But with respect to the learned judge, there is no dispute as to the actual party operating the sawmill owned by Foong, which is Lampak. One Mr. Gan Thian Beng was the man on the ground running the show for Lampak. The sawn timbers meant for the appellant were graded by various graders who prepared grading summaries on the instruction of this Mr. Gan. These graders were paid for their services by Lampak. Those grading summaries were given to Mr. Gan for further action. The various invoices were issued under the letterhead of Lampak in favour of the appellant and the various payment vouchers carried the letterhead of the appellant made in favour of Lampak. Also in evidence which is not in dispute is that 9 cheques were issued by the appellants to the credit of Lampak being contract price for the supply of the sawn timbers ordered by the appellant amounting to RM597,152.39. All these pieces of evidence would go to suggest that Lampak was doing it all for Foong who entered into contract to supply the timber from his sawmill under the operation of Lampak to the appellant. It was Foong who instructed the arrangement to be such, thereby constituting Lampak as its agent in the transaction. However, if we are wrong on this conclusion, we found that there clearly was created the contractual relationship directly between the appellant and Lampak, albeit orally which were evidenced by the various documents mentioned. The learned judge in concentrating on the various written contracts entered into between the appellant and Foong had lost sight of this distinct contractual relationship subsisting between the appellant and Lampak. To the learned judge, the various contract documents tendered on behalf of the respondent in the case before him were crucial in determining the appellant's claim against the respondent. Hence, in the circumstances, to

hold that there's no privity of contract between the appellant and Lampak was clearly erroneous. With respect we feel that the learned judge in his judgment had misconstrued the decision of Peh Swee Chin J (as he then was) in *KTS Sdn. Bhd. v. Foong Seng Fuat Sawmill Sdn. Bhd. & Anor.* [1987] 1 CLJ 596 which is High Court Civil Suit No. 1543 of 1985 mentioned earlier. There, Peh Swee Chin J. was of the opinion that when a person signs a contract which cites his own name as a party thereto, without any qualification contained anywhere in the contract, indicative of his acting as an agent for any third person, or principal, then he must be presumed to have contracted personally. This must be so even if the other party to the contract was aware that he was signing the contract for the third person or principal. This principle would not apply in the present case in regard to the distinct independent oral contract entered into between Lampak and the appellant. The learned judge also excluded the oral evidence in the case to contradict the terms of the said written agreements purportedly to be in pursuant of s. 92 of Evidence Act without considering this so called oral evidence as that evidence to introduce the independent oral contract between the appellant and Lampak as so excepted by the general provision of s. 92. This exclusionary provisions is applicable only in respect of an attempt to contradict the evidence found in the documents establishing the contractual relationship between the contracting parties to the written agreements. But in the present case before the learned judge, the issue is between Lampak and the appellant. The oral evidence proffered was not in anyway put in with a view to contradict the written agreements entered into between the appellant and Foong but its introduction was purely for purpose of establishing the existence of an independent oral contract between Lampak and the appellants over the supply of the sawn timber of which full payments had been made. Therefore, on this ground alone to dismiss the claim of the appellant against the respondent in this action is clearly erroneous.

In holding that there is no privity of contract between Lampak and the appellant the learned judge found another reason for it in his judgment. While recognizing that there is an equitable exception to the privity of contract in law, the learned judge found there was none in the present case before him because after perusing the various written contracts between Foong and the appellant he found nothing in the said contracts to suggest that Lampak has an interest in the transaction between the appellant and Foong. However, to the contrary, there was in evidence before the learned judge of the direction by Foong, the owner of the sawill, to Lampak, who was running the actual sawmill business at the premises, to supply the timber, the subject matter of the contracts between it and the appellant, to the appellant and was further supported by the evidence of the grading summaries, invoices and payment vouchers, and the issuing of

cheques which clearly establish an independent contractual relationship between Lampak and the appellant. For that reason, we are of the view that there was established between the appellant and Lampak a valid contractual relationship albeit orally.

There is to be found in the judgment of the learned judge also as to why the appellant cannot make any claim on the insurance money in the hands of the respondent. The reason being that there is no nexus between the appellant and the respondent contractually. Indeed there was no contractual relationship as such between the appellant and the respondent. But, having established the contractual relationship between Lampak and the appellant, one needs to refer to the documents upon which the respondent was involved in claiming a portion of the insurance money paid by the insurance company in connection with the destruction of the property of the appellant in the fire which gutted the premises where the undelivered sawn timber were kept. That document is the Fire Policy referred to earlier. The property insured by the joint assured of which the respondent is one, according to the Schedule provided, includes properties held in trust found on the premises. It covers all materials and stock-in trade consisting mainly of sawn timber and logs in connection with the insured's trade contained within the premises compound. As for the respondent viz-a-viz the Fire Policy, it might have an insurable interest in respect of some of the properties in the sawmill to cover the amount owned to it by Lampak. If such is the case, the respondent should have taken a separate policy covering that interest of his. But here, instead of doing so, the respondent chose to join in with Lampak as co-assured to obtain a fire policy to include also those properties which it very well knew did not belong to it and for that matter it had no insurable interest over it i.e. that properties held in trust by Lambak in favour of the appellant. Hence, of the money the respondent received from the insurer in respect of the fire at the sawmill, must necessarily include that amount which belong to the appellant in respect of properties held in trust by Lampak for the appellant. The respondent cannot, therefore, say that the RM607,018.49 which it received as its share by the consent order of the court mentioned earlier, represents its insurable interest. As for the amount belonging to the appellant in the hands of the respondent, we cannot but conclude that the respondent holds it in trust for the appellant.

It cannot be denied that certain sawn timbers belonging to the appellant was in the premises compound when the fire broke out. The price for that had been paid in full by the appellant to Lampak duly supported by the grading summaries, payment vouchers, invoices and cheques to the credit of Lampak. But before those sawn timbers were delivered to the appellant, they were destroyed by the fire. Pending delivery of them they were in the hands of

Lampak holding them on trust for the appellant. Those properties held in trust by Lampak is the subject matter of the Fire Policy of which the respondent is one of the assured. Therefore, part of the money paid out by the insurers on account of that Fire Policy belongs to the appellant beneficially. Both the respondent and Lampak settled the amount with the insurers for RM700,000 of which RM597,152.39 belong to the appellant beneficially. Without any regard to this beneficial interest of the appellant, Lampak and the respondent in their suit against the insurers by consent apportioned this RM700,000 between themselves. It is not in evidence, however, how they worked about this apportionment. Fortunate enough for the appellant, out of this RM92,982 in the hands of Lampak, it was able to recover a sum of RM57,956.56 before Lampak was wound up. As to the balance of RM539,195.83 the appellant went before the learned judge to recover from the respondent. Having gone through the submissions and the evidence before us, we are of the view that the appellant is entitled to do so having traced the balance to be in the hands of the respondent out of the RM607,018 apportioned to it by the consent order.

In *Hepburn v. Tomlinson (Hauliers) Ltd.* [1966] AC 451 @ 469, Lord Read said:

> This case has been complicated by the supposed existence of a rule that, if the insurer has only a limited interest in the subjects insured, he cannot recover more than sufficient to indemnify him against his own personal loss, unless it is shown that he intended to insure for the benefit of the owner of the subjects.

In *Maurice v. Goldsbrough Mort & Co. Ltd.* [1939] 3 All ER 63, the policy taken was against loss or damage by fire or lightning of the property described in the schedule, which is quite similar to the situation before us now. The description in the schedule was:

> ... on merchandise the assureds' own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire.

Construing the contract, Lord Wright at p. 69 said:

> In effect, in a policy of this nature, the policy moneys represent the goods when the goods are destroyed by fire, and the rights in these moneys are apportionable accordingly to the respective interests or property rights in the goods themselves.

Hence, it is erroneous to say that the appellant cannot make any claim on the insurance money in the hands of the respondent.

Another aspect which affects the decision of the learned judge resulting in the dismissal of the appellant's action against the respondent is this. In the judgment, the learned judge touched on the credibility of the appellant in instituting this action against the respondent. We are of the view that it was unnecessary at all for the learned judge to rely on the case of the appellant against Foong and Lampak in *KTS Sdn. Bhd. v. Foong Seng Fuat Sawmill Sdn. Bhd. & Anor.* [1987] 1 CLJ 596 which is High Court Civil Suit No. 1543 of 1985 mentioned earlier. Admitting that the matter was never raised by the respondent, the learned judge made a point to use the case to attack the credibility of the appellant in this action before him. He noted that although the appellant had entered partial judgment (for 6 contracts) against Foong and obtained default judgment against Lampak, the appellant did not proceed to enforce the judgments. This in a sense is not true because according to the court order of 29 August 1990 at the instance of the appellant, Foong was wound up by the court under the provisions of the Companies Act 1965 and the Official Receiver was ordered to be appointed as provisional liquidator for the purpose of the winding up. As for Lampak, there is in evidence that attempts were not to recover the judgment sum from it but managed to recover only a sum of RM57,956.56 leaving a balance of RM539,195.83 which by this action the appellant was claiming from the respondent, since Lampak had been wound up as well. Hence, the wrong assessment of the evidence before him has indeed affected the decision of the learned judge against the appellant.

While recognizing that Foong was the owner of the sawmill and it was operated by Lampak with Mr. Gan in charge, the learned judge erroneously concluded that there was no formal evidence adduced to establish the nature of the relationship between Foong and Lampak. For such conclusion, the learned judge was of the view that the appellant elected to enter into a contract with Foong instead of Lampak was because Lampak was operating the sawmill without a licence. However, we do not find any evidence to support such a conclusion. To support his conclusion, the learned judge has this to say:

> In our present case, although the consideration in the contract is not forbidden by any law, I must say that the nature of the contract itself is for the purpose of defeating the provision of s. 13 of the Malaysian Timber Industry Board Act. I therefore rule that this contract falls within the ambit of s. 24(b) of the Contract Act. Such contract cannot be enforced in court simply because they infringe the provisions of s. 13 of Malaysian Timber Industry Board Act i.e. to regulate the timber industry in this country. Therefore, I conclude that the alleged contracts that existed between KTS and Lampak for the purchase of sawn timber was unlawful and illegal.

I have perused carefully the written submission of plaintiffs' counsel and I must say I cannot accept his argument that the illegality that exists in this case is only as to the fact that Lampak was operating without a licence. He pointed out that in this case, plaintiffs are suing the Bank for the insurance money that was paid to them. He distinguished the facts of the case between *Mustafa bin Osman vs Lee Chua & Anor* [1996] 2 MLJ 141 and *Mistry Amar Singh vs Kulubya* [1963] 3 All ER 499. I agree that the facts of those two cases are distinguishable, but I must point out that in the present case, the plaintiffs' claim was based on an illegal contract. No doubt the plaintiffs are suing the Bank, and not Lampak, but upon perusing their statement of claim, it is clear from para. 3 of the claim that the sum of money claimed arose from the transaction between KTS and Lampak. Essentially, the contract between plaintiffs and Foong Seng Fuat goes to the root of plaintiffs' claim. As such plaintiffs' counsel's submission that the plaintiffs' claim is not based on an illegal contract is without substance. Mistry Amar Singh's case is of no application in our present case.

For the reasons given above I dismiss plaintiffs' claim with costs.

Therefore, the issue here is whether the arrangement entered into between the appellant and Lampak amounts to an illegal contract that should be struck down. The learned judge relied on s. 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973 to strike down the contract as being an illegal one within the ambit of s. 24(b) of the Contract Act 1950. According to the learned judge, the nature of the contract is for the purpose of defeating the provisions of s. 13 of the Malaysian Timber Industry Board Act. We believe the Act mentioned by the learned judge is the Malaysian Timber Industry Board (Incorporation) Act 1973 because of his citation of the provisions of s. 13 of the latter Act. Be that as it may, in so holding he relied on sub-ss. (5), (6) and (7) thereof, because we believe he would not be able to rely on sub-ss. (1), (2), (3) or (4) because the transaction with the appellant did not involve the export of timber or carry on business as an exporter envisaged by subsection (1) thereof. Neither did it involve the carrying on of the business as a jetty operator, grading timber or for the purpose of the export trade as a supplier, packer or manufacturer as envisaged in sub-ss. (2), (3) or (4) thereof. From his judgment, the learned judge relied on sub-ss. (5), (6) or (7) thereof to hold that the contract was unlawful. But sub-s. (5) in particular, is only an enabling provisions for the Minister from time to time, by order published in the Gazette, to require specific classes, kinds or descriptions of suppliers, packers or manufacturers, not being those carrying on business as such for the purpose of the export trade to register themselves as such under the Act. However, there was nothing before him to show that the Minister had acted under that enabling provisions to include the business carried on by Lampak

by any order published in the Gazette. Consequently, sub-ss. (6) and (7) would not apply to Lampak. As such Lampak was not caught at all by the provisions of s. 13 of the Act. For falling into such error, he had erroneously held that the arrangement between Lampak and the appellant was an illegal one. In any event, even if the learned judge was right in his interpretation of s. 13 of the Act, it would not make the appellant to suffer the evil of Lampak as there is no evidence that in making the arrangement, the appellant was in pari delicto. There is no evidence to suggest that the appellant knew in the first place that Lampak was operating the business illegally when it entered into the arrangement with Lampak. Be that as it may, the sanction for infringing the provisions is the criminal liability to be suffered by Lampak as so provided in sub-s. (7) thereof without affecting its transaction with the appellant.

In *Asia Television Ltd & Anor v. Viwa Video Sdn Bhd & Connected Cases* [1984] 2 MLJ 304, the appellant, a copyright owner in certain films in video cassette form obtained ex parte Anton Piller Orders against the respondent. The respondent applied to set aside those orders and for the return of all those materials removed from their premises pursuant to the ex parte orders. The High Court allowed the application of the respondent holding that as there was no certificate of approval for the publication of the films as required under the Films (Censorship) Act there was no valid publication of the film under the Copyright Act by the appellant. Hence, such publication by the appellant was unlawful, illegal and an offence punishable under the Act and therefore, no copyright had been acquired as a result. On appeal by the appellant to the then Federal Court, its appeal was allowed because there was no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they were otherwise qualified although they were in breach of the provisions of the Film (Censorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions. In the case before us now, it is in a worse position because in the first place, Lampak does not come within the ambit of s. 13 at all.

In the circumstances, having considered all matters before us in this appeal we have no alternative but to allow this appeal of the appellant against the dismissal order of the learned judge. We entered judgment for the appellant as prayed in the statement of claim with costs here and below.

My learned brothers, Abdul Hamid Mohamad and Richard Malanjum JCAs have read the draft and consented to it.